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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 428

THE UNITED STATES OF AMERICA, APPELLANT

v.

NATIONAL ASSOCIATION OF REAL ESTATE BOARDS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court for the District of Columbia (R. 437) is reported in 84 F. Supp. 802.

JURISDICTION

The final judgment of the District Court was entered on July 29, 1949 (R. 436). The petition for appeal was filed and allowed on September 23, 1949 (R. 440–441). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 989. Probable jurisdiction was noted on November 21, 1949 (R. 629).

QUESTIONS PRESENTED

The principal question presented by this appeal is whether the established principle that price-fixing agreements are illegal *per se* under the Sherman Act is inapplicable to a combination to fix the rates of real estate brokerage commissions in the District of Columbia, simply because (1) personal services are involved in brokerage transactions, and (2) no penalties are imposed to compel adherence to the rates fixed.

In addition, the following question is raised by appellees as a ground for supporting the decision below: Whether a judgment of acquittal in a criminal action under the Sherman Act is res judicata in a civil action founded upon the same allegations of fact.

STATUTE INVOLVED

The Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, provides in part as follows:

> SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, * * * is hereby declared illegal. [15 U. S. C. 3.]
>
> SEC. 4. [as amended by the Act of March 3, 1911, Sec. 291, 36 Stat. 1167]. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in

their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * * [15 U. S. C. 4.]

STATEMENT

This is a civil action brought by the United States on August 27, 1947, in the United States District Court for the District of Columbia against (a) Washington Real Estate Board (hereinafter referred to as "the Washington Board"), an incorporated association of real estate brokers in Washington, D. C. (Fng. 1, R. 433), (b) fifteen of its members individually and as representatives of a class consisting of all members of the Washington Board, (c) National Association of Real Estate Boards (hereinafter referred to as "the National Association"), a nation-wide incorporated trade association of which both the Washington Board and its active members are members (Fng. 18, R. 434), and (d) Herbert U. Nelson, its executive vice-president (Fng. 19, R. 434).

The complaint charged appellees with engaging in a combination and conspiracy in violation of Section 3 of the Sherman Act to fix the commission rates to be charged by the members of the Washington Board for their services when acting as brokers in the sale, exchange, lease and management of real property in the District of Columbia (R. 367). The complaint sought a declaration that the combination to fix rates was illegal,

annulment of various provisions in the constitutions and by-laws, codes of ethics, and other rules of the appellee associations prescribing adherence to rates or schedules of commissions, an injunction against continuation of the price-fixing practices, and such other relief as the case might require (R. 372).

On the same day that the complaint in this case was filed, an indictment was returned against the Washington Board and the National Association (Fng. 21, R. 435), charging the defendants criminally with having engaged in substantially the same combination and conspiracy alleged in this action (Fng. 22, R. 435). In May 1948, the criminal case came on for trial. At the conclusion of the Government's case, on June 4, 1948, the district court (Judge Curran) granted the defendants' motion for a judgment of acquittal (Fng. 24, R. 435): *United States* v. *National Association of Real Estate Boards, et al.*, 80 F. Supp. 350 (D. D. C.).

On July 5, 1948, appellees filed motions for summary judgment in this action contending that the judgment of acquittal in the criminal case is res judicata here (Fngs. 25, 26, R. 435). The district court (Judge Goldsborough) overruled these motions (Fng. 26, R. 435), and a petition to the Court of Appeals for allowance of a special appeal from that ruling was dismissed for lack of jurisdiction. *National Association of Real*

Estate Boards v. *United States*, 176 F. 2d 631 (C. A. D. C.).

At the suggestion of the district court (Judge Holtzoff), the parties entered into a stipulation that the civil case would be tried on the record made in the trial of the criminal case but the Government reserved the right to offer any exhibits which had been excluded in the criminal case (R. 330–333, 428).[1] In the ensuing trial the Government offered 16 of these exhibits and all were received in evidence (R. 335–336).[1a] No evidence was offered by appellees (R. 336).

On June 28, 1949, the district court rendered an opinion concluding that the agreement upon the rates of brokerage commissions to be charged by members of the Washington Board is not a violation *per se* of Section 3 of the Sherman Act and that there had been no showing that such agreement effected an unreasonable restraint of trade (R. 440). The court on July 29, 1949, filed its findings of fact and conclusions of law, and entered a judgment in favor of the appellees on the merits (R. 433–436).[2]

[1] In the criminal trial the Government offered 47 exhibits. Eight witnesses testified, all but one of whom were officers, members or employees of the Washington Board or National Association.

[1a] Gov. Ex. 49, R. 618, offered but excluded in the criminal case (R. 190–192), was not re-offered during the trial of this case, and was printed through inadvertence.

[2] The defense of res judicata was again overruled (Concl. 4, R. 436).

THE ACTIVITIES OF THE WASHINGTON BOARD

The 250 members of appellee Washington Board handle a substantial portion of the real estate brokerage business in the District of Columbia (Fng. 2, R. 433). They act as agents for the sale, exchange, lease and management of real estate for a commission or fee (Compl., par. 8, R. 366; Ans., Wash. Bd., par. 8, R. 384–385). Although some of the broker-members of the Board are corporations (Fng. 3, R. 433) or employ salesmen (R. 250–251, 263, 273, 280), the court below characterized their business as "personal services in the sale, lease and exchange of real estate" (Fng. 5, R. 433).

Article 2 of the "Constitution and By-laws" of the Washington Board states as one of the objects of the Board "To assure to the public the services of responsible and trustworthy agents and brokers, acting on definite and uniform standards of contracts and charges, with the view of protecting the interests of all parties" (Gov. Ex. 3, R. 462). The Washington Board openly adopts and publishes, and for a period of years has adopted and published, schedules of "standard" commissions for the services performed by its members in the sale, exchange, lease, and management of real estate in the District of Colum-

bia.[3] As the court below put it, "The Washington Board has for many years prescribed fixed rates of commissions to be paid to brokers" (Op. R. 438; see Fng. 6, R. 433). The Schedule of Commissions adopted by the Board is a detailed rate book which lists charges for every conceivable service furnished by a real estate agent (Gov. Ex. 25, R. 569–574). The Schedule occupies six pages of the printed record and contains 46 separate subsections.[4]

The method of the Washington Board in arriving at the rates which it prescribed is reflected in the minutes of a special meeting of the members of the Washington Board held February 16, 1943, to consider the recommendations of a committee with respect to a proposed revision of the rates applicable to sales of real estate.[5] The

[3] Fng. 6, R. 433; Fng. 8, R. 433; Compl., pars. 17–21, 23–27, R. 368–371; Ans., Wash. Bd. pars. 17–21, 23–27, R. 386–390. The standard form of sales contract prepared by the Washington Board for optional use by its members (Fng. 17, R. 434) contains the following provision with respect to rates of commission (Gov. Ex. 26 (par. 16) R. 575–576): "The seller agrees to pay to * * * Agent, the regular rate of commission fixed by the Washington Real Estate Board * * *."

[4] The Schedule is divided into seven sections respectively entitled, "Sales", "Exchanges", "Leases—Business Property", "Leases—Residential Property", "Property Management", "Mortgage Loans" and "Special Services."

[5] The then existing commission rates were as follows (Ans., Wash. Bd., par. 20, R. 387–388):

> "Five per cent on all sales in Cleveland Park, Saul's Addition, Chevy Chase, Bradley Hills, Brightwood, Takoma Park, Brookland and similar vicinities.

committee reported in part as follows (Gov. Ex. 20, R. 553–554):

> "Your committee submits that conditions have changed to such an extent since 1917 that the lower commission rate charged on property within the old 'city proper' area is unfair and inequitable, causes embarrassment and confusion among owners and brokers, and has in many cases caused bad feeling among owners, who, while not objecting to a 5% commission rate, see no reason why they should be charged more than their friend whose property might be a block or less away."
>
> * * * * *
>
> "Lastly, we submit there is no legitimate reason why the commission rates in Washington, D. C., which has been well described as the Capital of the World, should not be comparable to those rates charged by other large cities, the rates of which are shown below:

Philadelphia	5% straight—no ceiling.
St. Paul	5% straight—no ceiling.
Syracuse, N. Y.	5% straight—8% beyond 7 miles from center of city.
Chicago	5% to $100,000.—3% above.
Kansas City	5% to $100,000.—3% above.
Columbus, Ohio	5% to $100,000.—4% above.

Five per cent on sales of $5,000 and less, in City area, with 3% additional charged on the excess above $5,000.

Minimum commission for any sale, $50.00."

The proposed rates included a commission of 5% on sales up to $50,000, 3% on the excess above $50,000, and a minimum sales commission of $100, irrespective of whether the property is located in the "city" or "suburban" area.

> "It will be noted that the suggested change eliminates the theoretical boundary line but at the same time *fixes* the District of Columbia rate a great deal more favorable to the property owner than in any city above named." [Emphasis added.]

The minutes then recount the discussion by the Board members of the committee report (*id.*, R. 554):

> The subject was generally discussed as well as the proposed $50,000 ceiling. An amendment was offered by Mr. Breuninger to the motion of Mr. McConihe for the adoption of the report providing for a $25,000 ceiling but this was rejected by a majority vote.
>
> The motion providing for a 4% overall rate died for want of a second. During the discussion, it was suggested that the Board should make a study of services performed by members for which they are not now being compensated. The motion offered by Mr. McConihe and seconded by Mr. Hohenstein providing for adoption of the report of the Brokers Committee was then unanimously approved.

The new schedule adopted resulted in higher charges in many instances and lower charges in others (Fng. 10, R. 433–434).

In setting forth its schedule of commissions, the Washington Board has not merely declared what had previously been established by custom.

As counsel for the Washington Board stated in the court below, before the adoption of the schedule the "business of selling and exchanging and leasing and managing real estate was a matter of every real estate man charging about what he could get" (R. 24). And the court found that "Before the board attempted to fix standard commission rates, there was chaos and confusion resulting in occasional excessive charges, and one of the purposes of the Board was to eliminate this undesirable condition" (Fng. 14, R. 434).[6]

The duty of the members to adhere to the rates fixed by the Board is reflected in Section 3 of the Board's "Code of Ethics" which explicitly provides that "Brokers should maintain the standard rates of commission adopted by the board and no business should be solicited at lower rates" (Fng. 15, R. 434). Not only must an applicant for membership in the Washington Board sign an application form which states thereon that he

[6] Although the court was clearly right in concluding that the Washington Board's purpose was to stabilize commissions, we have assigned this finding as error because the record is bare of any evidence indicating the condition of the brokerage industry in the District of Columbia—chaotic or otherwise—prior to the time when the Board first fixed rates. The only evidence of chaos and confusion relates to the period when, prior to the 1943 revision of rates, the Washington Board had rate zones (R. 112, 115, 269, 284). Since, however, it is the Government's contention that rate fixing is illegal *per se*, the conditions present when a free market for brokerage services existed would not, in our view, be material in any event.

agrees to subscribe to the Code of Ethics (Fng. 9, R. 433), but as the Washington Board expressly admitted in its answer (par. 18, R. 386–387), the members agree as a condition of membership that they will abide by the above provision.

With respect to the practices of the members, the court stated: "In actual practice, the prescribed rates of commissions are used in the great majority of transactions, although at times, in exceptional situations, a lower charge is made than that prescribed by the Board" (Op. R. 438; and see Fngs. 11, 12, R. 434).

Notwithstanding the above findings regarding agreement and adherence, the court concluded that the rate schedules of the Board have been treated by the members as "non-mandatory" in character. This conclusion apparently reflects the court's view that there have been no penalties imposed for violation of the prescribed rates (Fng. 16, R. 434). During the hearing on the adoption of findings, the following colloquy ensued between the court and Government counsel as to the meaning of "non-mandatory" (R. 350–351):

> Mr. KRAMER. If the Court please, if the words "non-mandatory in character" were changed to read "the rates should be adhered to," I would follow the finding, but this can be construed in almost any direction counsel wishes to construe it.
>
> The COURT. There is nothing ambiguous about the words "non-mandatory."

> Mr. KRAMER. Of course, if you come to an interpretation——
>
> The COURT (interposing). Not at all, because there are some associations of brokers which would penalize a broker for not—I am going to leave it the way it is. I think it is just a choice of words.

Although sanctions for departure from rate schedules have not been invoked, Article 13 of the Washington Board's by-laws (Gov. Ex. 3, R. 471), which is entitled "Membership Forfeiture", includes the provision that

> The Board of Directors, upon complaint or on its own initiative, by majority vote may censure, suspend or expel any member for conduct which in its opinion is *subversive to the purpose and scope* of this Board, provided, however, that any such member shall be given an opportunity to appear before the Board of Directors to answer the complaint. [Emphasis supplied.]

As has been noted, Article 2 of the Constitution and By-Laws includes as one of the "objects" of the Washington Board "uniform standards of contracts and charges" (Gov. Ex. 3, R. 462). And quite apart from the sanctions of the Washington Board, its members and the Board itself are subject to the sanctions of the National Association, discussed *infra*, pp. 14–15.

The Executive Secretary and the two members of the Washington Board who testified in this

case uniformly asserted that the members of the Board are not bound by the published rates (R. 123–124, 138, 264, 292), and that no penalty or sanction has been imposed for departures (R. 124, 139, 263, 293). But the Executive Secretary also testified that in the usual case he advised members who inquired that it was "unethical and improper" to cut rates (R. 129). The Secretary was unable to recall any letter written by him stating that the rules permitted cutting commission rates (R. 129). One Board member (Beitzell) testified that the Board's action in 1943 in revising its commission rates was important to his business (R. 255–256) because he "followed the general pattern of the charges by all brokers" (R. 256). And he admitted that the Board's schedule was the "general rule" for the members and that he "attempted to follow the general rule" although he "made exceptions in the rules, many times" (R. 271).

THE PARTICIPATION OF THE NATIONAL ASSOCIATION AND HERBERT U. NELSON IN THE ACTIVITIES OF THE WASHINGTON BOARD

Appellee National Association is an incorporated trade association including as members some 42,000 real estate brokers and persons affiliated with the real estate business in the United States and some 1,040 local real estate associations (R. 142). Appellee Herbert U. Nelson is the executive vice-president of the National Asso-

ciation (Fng. 19, R. 434). Every active member[7] of the Washington Board, and the Board itself, are members of the National Association (Fng. 18, R. 434; see also R. 35, 83–84).

Article 9 of the National Association's "Code of Ethics" provides (Gov. Ex. 6, R. 483):

> The schedules of fees established by the various real estate boards are believed to represent fair compensation for services rendered in their communities and *should be observed by every Realtor.*[8] [Emphasis supplied.]

The National Association has adopted rules and sanctions relating to maintenance of the "Code." Thus, as a condition of membership in the National Association, the Washington Board and its members (and other local boards and their members) agree to abide by the "Code of Ethics" promulgated by the National Association (Ans., Nat'l Assn., par. 16, R. 376). And each member board is explicitly required by the National Association's by-laws to adopt the code "as a part of its rules and regulations for violation of which

[7] There are also "associate" members consisting of salesmen and other employees of active members (Gov. Ex. 3, R. 463).

[8] The word, "Realtor" is defined by the National Association as a "person engaged in the real estate business who is a Board Member or an Individual Member of the National Association of Real Estate Boards, is subject to its rules and regulations, observes its standards of conduct, and is entitled to its benefits" (Gov. Ex. 7; R. 488). See also Webster's New International Dictionary (2nd ed.), p. 2073.

disciplinary action may be taken" (Article III, Section 1, Gov. Ex. 7, R. 502).[9] Although the sanction has never been invoked (R. 225) any member board which "shall neglect or refuse to maintain and enforce the Code of Ethics with respect to the business activities of its constituent members" may be expelled from the National Association (Article III, Section 2, Gov. Ex. 7, R. 502–503).

In addition to its by-laws and code of ethics above described, the National Association has taken an active part in the formulation of standards of compensation through the activities of its various committees on rates, rules and customs. From time to time these committees made studies of brokerage commission rates prevailing over the United States and prepared reports which were distributed to member real estate boards (Ans., Nat'l Assn., par. 14, R. 375). The National Association offered these studies as guides to the various real estate boards and to their members in order that all of the brokers throughout the United States might be informed as to the fees and charges made generally throughout the

[9] The foreword or preamble to the Washington Board's constitution and by-laws states that every realtor (i.e. member) "has pledged that he will observe and abide by the Code of Ethics promulgated by the National Association, and adopted by his own Board to govern real estate practices of members of the Board * * *" (Gov. Ex. 3, R. 462). The same statement is repeated in the application for membership in the Washington Board (Gov. Ex. 9, R. 511).

United States for services rendered in connection with real estate (*ibid.*). As expressed by appellee Nelson in 1935 in a letter describing a committee study to a member of the Washington Board (Gov. Ex. 30, R. 584):

> * * * The purpose of this Committee [on Rates, Rules and Customs] is to study the schedules now in existence and to see *if there could be developed something in the way of a national schedule* with proper provisions for regional and local variations and for variations due to size of cities.
>
> Insurance companies and other institutional investors having property in various cities complain constantly, and with justice, about the confusion and the seemingly illogical variations that now exist. If we can clarify this situation it may well be that we can improve the income of our membership and *gain wider acceptance for the fair charges established.* [Emphasis supplied.]

In 1946, the same officer of the National Association wrote (Gov. Ex. 48, R. 617–618):

> Generally speaking, most Boards have charges which are probably too low in relation to present costs of doing business. Often a Board will hesitate to increase its charges, fearing to lose business. *If all Boards can act together, each individual Board will gain confidence and strength from such action.* [Emphasis supplied.]

There was evidence that the Washington Board has, in considerable measure, been guided by the National Association's advice. Thus on February 10, 1939, a special "Commission Study Committee" of the Washington Board held a meeting to discuss changes in the schedule of commissions of the Washington Board (Gov. Ex. 12, R. 518–519). The minutes of this meeting stated in part (R. 519):

> * * * the suggestion [was] made that in view of the fact that the National Association had appointed a special committee on commission rates and rules that copy of its report might be obtained for the consideration of the Committee.
>
> * * * * * *
>
> After a further discussion a motion, duly carried, was made to the effect that the Committee *defer action on the recommendations of the Brokers Committee until such time as the Committee could come to a conclusion following its study of proposed service charges suggested by the National Association* and the recommendations of Mr. Luchs.
>
> It was suggested by Mr. Taylor that *as Mr. Bangs has been named a member of the National Association's Committee on Commission Rates and Rules it might be well to appoint him as a member of the present Committee.* [Emphasis supplied.]

The minutes of a meeting of the same committee held on May 10, 1939 (Gov. Ex. 27; R. 577–578) stated in part as follows (*ibid.*):

> Mr. Smith called the meeting to order and called upon *Mr. Bangs who made an informal report on the action of the National Association's Committee on Rates, Rules and Customs.* * * *
>
> It was the general sense of this Committee that should any change be made in the Washington Board's schedules that *the study being made by the National Committee would be highly essential and beneficial to the local Board.*
>
> It was brought out during the discussion that the resolutions of the National Committee would only be in the shape of a guide and not an attempt to force the adoption of a nation-wide commission schedule.
>
> Motion offered by Mr. Taylor, seconded by Mr. Koones, recommended that *no action be taken by this Committee in connection with the study of existing commission schedules until such time as the Washington Real Estate Board is in receipt of the recommendations of the Committee* on Rates, Rules and Customs, after their approval by the National Association of Real Estate Boards. This motion was unanimously adopted. [Emphasis supplied.]

On June 16, 1941, the Chairman of the Committee on Rates, Rules and Customs of the Na-

tional Association, of which H. C. Bangs of the Washington Board was a member (*supra*, p. 17; Gov. Ex. 17–A, R. 545), sent a letter to the Executive Secretary of the Washington Board enclosing copies of a "Guide" on commission rates, rules and customs prepared by the National Committee on this subject (Gov. Exs. 17, 17–A, R. 536, 537). This letter stated in part (Gov. Ex. 17, R. 536):

> It is the purpose of our Committee this year to try to perfect our guide and to bring the matter of improvement of local Board schedules before the delegates at the Detroit Convention in November.

The Guide contained suggested commission rates to be charged for the sale, exchange, lease and management of real property.

In a report to the National Association in January, 1942 appellee Nelson stated (Gov. Ex. 43, R. 616):

> As a result of the [Rates, Rules and Customs] Committee's activities many Boards are making complete studies of their existing schedules with a view toward changing them to conform as nearly as possible with the suggested National guide. It is interesting to note that the Boards which are changing their schedules are revising upwards.

The Washington Board in 1943 adopted a new schedule of commission rates for the sale of real property in the District of Columbia (Gov. Ex. 28,

R. 578) and in 1944 it again revised its schedule (Gov. Ex. 25, R. 569). The Secretary of the Washington Board testified that he "doubted" that the Board even considered the Guide (R. 126). However, the recommendations contained in the Guide and the changes adopted by the Washington Board in 1943, and in 1944, contain striking similarities. Thus, the National Association's "Guide" recommended a commission of 5% on the first $100,000 of the sales price, 3% on the next $400,000 and 2% on the balance; and a minimum commission on sales of improved property of $100 (Gov. Ex. 17 A, R. 544). The Washington Board changed its rate for "city" property from 5% on the first $5,000 and 3% on the balance (R. 387–388) to 5% of the sales price on the first $50,000 and 3% on the balance; and from a straight 5% on property in the outlying areas of the District to 5% on the first $50,000 and 3% on the balance (R. 578). The Board also changed its minimum commission from $50 to $100 (*ibid.*). In December 1944 when the Washington Board again changed its schedule of commissions, at least three of the changes consisted in the addition of new subsections to the schedule (see Gov. Ex. 23, R. 559–566), the language of which is virtually identical with that in paragraphs appearing in the "Guide" submitted by the National Association.[10]

[10] Section 1, subsection 6 of the 1944 schedule reads (Gov. Ex. 25, R. 569):

> When property is priced at a salable figure the Realtor may advertise such listed properties at his own expense,

The trial court found that neither appellee National Association nor appellee Nelson "conspired with the Washington Real Estate Board, to fix and prescribe the rates of commission to be charged by members of the latter, nor to raise rates of commission in the District of

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however, the mere listing or placing of properties with a Realtor does not impose an obligation upon him to advertise at his own expense.

Section IA of the "Guide" reads (R. 537):

> When property is priced at a rentable or salable figure, the agent may advertise such listed properties at his own expense. Mere listing or placing of such properties with an agent does not impose an obligation upon the agent to advertise at his own expense.

Section 3, subsection 10 of the 1944 schedule provides (R. 571):

> If an agent procrues a modification or cancellation of a lease, the regular rental commission shall be charged for what would have been the total of the remaining rental under the lease had it run to its conclusion, the commission to be paid by the party whom the agent represents, or according to advance agreement.

Section XII, H of the "Guide" reads as follows (R. 541):

> If an agent procures a cancellation of a lease, the regular rental commission shall be charged and applied to what would have been the total of the lease had it run to its conclusion, the commission to be paid by the party whom the agent represents, or according to advance agreement.

Subsection 9 of Section 5 of the schedule (R. 573) and the first sentence of Section XII J of the Guide (R. 541) are identical and read as follows:

> An agent shall handle each lease or sublease as a new transaction and shall charge the established rental commission on total gross rent.

Compare also Section 7 of the 1944 schedule (R. 574) with sections II, VI and XVII of the "Guide" (R. 537, 538, 545).

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Columbia" (Fng. 20, R. 434). In the light of the evidence recited above and the comments of the court during the trial,[11] it would appear that this finding is in reality a conclusion of law which followed from the court's determination that the rate-setting activities of the Washington Board are legal.[12]

SPECIFICATION OF ERRORS TO BE URGED

The district court erred—

1. In concluding that the action of the defendants in publishing a standard rate of commissions charge for their services does not alone and of itself create an unreasonable restraint of trade in violation of the Sherman Act in the absence of a showing that such rates were unreasonable or oppressive in themselves or that they result in a

[11] During final argument by counsel for the National Association, the trial judge said (R. 341):

"The Court: Mr. Whiteford, does not this come down to a question of whether what the Washington Board did was legal or illegal, because whatever the Washington Board did, the National Board encouraged the Washington Board or incited the Washington Board to do? If what the Washington Board did is legal, then, of course, the activity of the National Board is praiseworthy. On the other hand, if what the Washington Board did is illegal, then the National Board is in the position of having advocated the doing of an illegal act."

[12] The court found that the members of the Washington Board perform personal services (Fng. 5, R. 433) and concluded that "For men to combine to regulate the compensation to be charged by them for their own services is entirely legal" (Concl. 2, R. 435).

substantial diminution of competition or otherwise create an unreasonable restraint of trade.

2. In finding that the schedules of standard commissions published by the Washington Real Estate Board have been construed by the members as non-mandatory in character.

3. In finding that there was no proof that the standard rate of commissions published by the Washington Real Estate Board is unreasonable or that this activity unreasonably restrains competition between brokers or adversely affects the sale of real estate.

4. In finding that neither the defendant National Association of Real Estate Boards nor the defendant Herbert U. Nelson conspired with the Washington Real Estate Board to fix and prescribe the rates of commission to be charged by members of the latter, nor to raise rates of commission in the District of Columbia.

5. In finding that before the Board attempted to fix standard commission rates, there was chaos and confusion resulting in occasional excessive overcharges, and that one of the purposes of the Board was to eliminate this undesirable condition.

6. In concluding that for men to combine to regulate the compensation to be charged by them for their own services is entirely legal.

7. In failing to grant the findings of fact requested by the plaintiff.

8. In entering a final judgment for the defendants.

SUMMARY OF ARGUMENT

I

The court below found that the Washington Board for many years has published real estate brokerage commission rates to which its members generally adhere. This alone would justify an inference of concerted action to fix rates, but in addition it is established by the undisputed evidence that the members of the Washington Board agreed upon the rates to be published and agreed to adhere to them. The finding of the court below that the rates have been construed as non-mandatory was plainly based upon its conclusion that no sanctions were imposed by the Washington Board for departure from the rate schedules. But the fact that no penalties are imposed for violation of trade restraining agreements does not make such agreements lawful. The "non-mandatory" finding cannot be interpreted as meaning that the members of the Washington Board did not obligate themselves to adhere to the published rates; if it were so interpreted, it would be irreconcilable with the court's opinion and the undisputed evidence.

The National Association has been a party to the combination of the Washington Board and its members to fix the commission rates. Its "Code of Ethics," to which the Washington

Board and its members are pledged to adhere, requires compliance with the rate schedule established by the Washington Board. And the National Association has aided in the formulation of that rate schedule.

II

This Court has held that both Sections 1 and 3 of the Sherman Act prohibit unreasonable restraints upon trade and commerce in services as well as goods. *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427; *American Medical Assn.* v. *United States*, 317 U. S. 519; *United States* v. *Trenton Potteries*, 273 U. S. 392. Price fixing agreements among those engaged in selling either commodities or services have uniformly been held to create unreasonable restraints of trade *per se*. The underlying reasons for the rule apply with the same force to rate fixing by real estate brokers as to price fixing in other businesses. In suggesting that the appellees would have violated Section 3 of the Sherman Act only if they had fixed unreasonable or oppressive rates, the court below places upon the federal judiciary the very duty of determining reasonable prices which this Court has abjured during the life of the Sherman Act. If there are advantages in excepting real estate brokers from the Sherman Act and permitting them to charge uniform brokerage commissions, Congress should make the exception. It has not done so. In the legislative

scheme for the regulation of real estate brokers in the District of Columbia, Congress has given no authorization for rate fixing, public or private.

The Washington Board and its members are not exempt under Section 6 of the Clayton Act (*Columbia River Packers Assn., Inc.* v. *Hinton*, 315 U. S. 143; *American Medical Assn.* v. *United States*, 317 U. S. 519) which relates exclusively to "labor, agricultural, or horticultural organizations" and their members. The Washington Board is not such an organization. Its members are employers rather than employees. They are corporate and individual entrepreneurs who assume the risks of their businesses.

III

Because of the greater burden of proof resting on the Government in a criminal case and because of the procedural differences between civil and criminal actions, it is settled that an acquittal in a criminal action is not a bar to a subsequent civil action involving the same defendants and the same facts. Appellees' argument in the court below that the judgment in the criminal case is res judicata in the present action was based on the premise that their motion for judgment of acquittal was in the nature of a demurrer to the evidence and that the trial judge had accordingly assumed as true all the facts charged in the indictment. The motion, however, was made under Rule 29 of the Rules of Crimi-

nal Procedure which does not permit a challenge to the indictment. And the criminal trial judge's opinion not only discloses that he did not assume as true all the facts charged, but that no question as to the sufficiency of the indictment was considered by him. The judgment of acquittal constituted only a holding that the evidence proved was not sufficient to sustain a conviction, and, therefore, under the settled rule it can not constitute a bar to this action.

ARGUMENT

I

APPELLEES HAVE BEEN PARTIES TO A COMBINATION FIXING REAL ESTATE BROKERAGE COMMISSION RATES IN THE DISTRICT OF COLUMBIA

A. THE WASHINGTON BOARD HAS ESTABLISHED COMMISSION RATES TO WHICH ITS MEMBERS GENERALLY ADHERE

1. The district court made no explicit finding that the Washington Board and its members were parties to a combination prescribing commission rates for real estate brokerage transactions in the District of Columbia. However, the court's opinion, discussing the questions of law involved in this appeal, was predicated on an implicit finding of such combination (R. 437–440). And the findings which the court did make, the answer of the Washington Board to the allegations of combination contained in the complaint, and the undisputed evidence detailed in the Statement, *supra*, clearly establish the existence of the combination

and the general adherence by the members to the rates which the court below stated the Board had "prescribed" (Op. R. 438).

Proof of the existence of the Washington Board's schedule of rates of commissions and of the fact that such schedule has generally been adhered to would in itself be sufficient evidence to justify the inference of the existence of concerted action to fix rates. *American Column & Lumber Co.* v. *United States*, 257 U. S. 377; *United States* v. *American Linseed Oil Co.*, 262 U. S. 371; *Interstate Circuit* v. *United States*, 306 U. S. 208; *United States* v. *Masonite Corp.*, 316 U. S. 265; *United States* v. *Paramount Pictures*, 334 U. S. 131, 142. But the evidence in this case goes far beyond that in the cases just cited. In addition to the evidence of adherence, there is direct and specific proof of consensual action. Thus, for example, at the special meeting of members of the Washington Board on February 16, 1943, the Board agreed upon a rate of commission for the sale of real estate in the District of Columbia, superseding rates which had been established previously. Such action was taken only after an extended study of two years (R. 22) by the Brokers' Committee and after approval of the proposed new sales commission rates by the Board of Directors of the Washington Board (Gov. Ex. 19, R. 549–550). Again, at a meeting on December 19, 1944, the Washington Board and its members agreed on a change in commis-

sion rates for long-term leases and a revision of the property management schedule (Gov. Ex. 24, R. 566–568; see also Gov. Ex. 23, R. 559–560).

Illustrative of the documentary evidence of these agreements was a special bulletin sent by the Executive Secretary of the Washington Board to all active members notifying them of the action taken at the meeting of February 16, 1943 (Gov. Ex. 21, R. 555–556) and stating in part:

> Placing the entire District of Columbia into one commission zone was accomplished this week when members of the Washington Real Estate Board *formally agreed* to the elimination of the two commission boundary zones which have been in existence for more than 20 years. [Italics supplied.]
>
> * * * * *
>
> The minimum commission on all sales of real estate within the District of Columbia shall be 5% of the sales price up to and including $50,000.00 and 3% on the excess above $50,000.00.
>
> The minimum commission for any sale shall be $100.00.

Each of the representatives of the Washington Board who was called as a witness frankly admitted that these agreements were made. In response to questions as to the meeting of February 16, 1943, the witness Beitzell, a second vice-president and member of the Washington Board (R. 251) testified (R. 255):

A. The members of the Washington Board, those who were present, voted in favor of the change.

Q. They agreed then, did they, that the standard rates of commission on the sale of real estate in the District was to be 5% on the first $50,000 and 3% on the excess; is that correct?

A. That is correct, to the best of my knowledge.

The witness Buchanan, a member and a former director of the Washington Board (R. 274), testified (R. 278):

Q. Is it not true that you agreed at this meeting, with all the other members of the Board, that the standard rate of commission on the sales of real estate in Washington was to be 5% on the first $50,000 and 3% on the excess?

A. That is right.

Q. Did you feel, Mr. Buchanan, at that time, that uniform action by members of the Board with respect to commission rates was advisable?

* * * * *

A. It was necessary. You can't change a commission rate without changing the by-laws, and you can't change those without action of the members of the Board.

The court inquired of this witness (R. 294):

The COURT: * * * I am trying to find out why was it necessary at all to have the Washington Real Estate Board meet

and agree on a reasonable rate of 5% on the first $50,000?

The WITNESS: Because in the vast majority of cases, those are the proper rates and what we consider an equitable pay for a broker's services.

The COURT: Those are the rates that you agreed upon?

The WITNESS: That is right * * *

The witness Rush, Executive Secretary of the Washington Board, testified to the same effect, as follows (R. 128):

> Q. Mr. Rush, did the members of the Washington Board agree that a standard rate of commission on sales of real property in the District of Columbia should be 5% on the first $50,000 and 3% on the balance at the meeting of February 16, 1943, about which your counsel asked you?
>
> A. Yes, the members voted.

The court below found that the Code of Ethics of the Washington Board provides that "brokers should maintain the standard rates of commission adopted by the board and no business should be solicited at lower rates." (Fng. 15, R. 434; Gov. Ex. 5, R. 478.) The court found that before a broker is allowed to join the Washington Board he is "required to fill out and sign an application form" which provides that the "applicant agrees to subscribe to the Constitution and By-Laws, Code of Ethics and other rules of the Washington Real Estate Board." (Fng. 9, R. 433; see

Gov. Exs. 9–11, R. 512, 515, 517.) Not only are "members of the Board * * * urged to use this schedule of standard commissions" (Fng. 7, R. 433) but as the Washington Board admitted in its answer (Par. 18, R. 386–387) all its members are required to agree as a condition of membership to abide by the Code of Ethics. And it has been understood by the Washington Board and its members that in normal cases it was not "ethical or proper" for members of the Board to solicit business at rates lower than those published in the schedule of commissions (R. 80).

2. The district court found that the rates in the schedules "have been construed by the members as non-mandatory in character" (Fng. 16, R. 434). Apparently the court in making this finding was referring to the evidence that the Board had never penalized members for failure to adhere to the schedule (see Statement, *supra,* pp. 11–12). The fact, however, that no penalties are imposed for violations of trade restraining agreements is irrelevant. *American Column & Lumber Co.* v. *United States,* 257 U. S. 377, 411; *Eastern States Lumber Ass'n* v. *United States,* 234 U. S. 600, 608; *Federal Trade Commission* v. *Pacific Paper Association,* 273 U. S. 52, 62. As the Court stated in the *Pacific Paper Association* case, "An understanding, express or tacit, that the agreed prices will be followed is enough to constitute a transgression of the law. No provision to compel adherence is necessary."

(273 U. S. at 62.) Here, as in the *American Column & Lumber* case, *supra*, at p. 411, the defendants relied for maintenance of concerted action "not upon fines and forfeitures * * * but upon what experience has shown to be the more potent and dependable restraints, of business honor and social penalties * * *."[13]

The essential element of an offense under the Sherman Act is the agreement, and it is immaterial whether it has been carried out. *Nash* v. *United States*, 229 U. S. 373, *United States* v. *Trenton Potteries*, 273 U. S. 392, 402; *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 225n. The evidence in the present case shows not only agreement upon the rate schedules—sufficient to establish a violation of the Act—but also general adherence to the agreed schedules. As the court below said, "In actual practice, the prescribed rates of commissions are used in the great majority of transactions, although at times, in exceptional situations, a lower charge is made than that prescribed by the Board" (Op. R. 438).

[13] It has been pointed out in the Statement, *supra*, pp. 10–11, that the Washington Board actually possesses the power to take disciplinary action for violations of rate schedules. The failure to use that power does not remove its coercive effect. As stated in a comparable situation arising under the Clayton Act, "The fact that the lessor in many instances forbore to enforce these provisions does not make them any less agreements within the condemnation of the Clayton Act." *United Shoe Machinery Co.* v. *United States*, 258 U. S. 451, 458.

Appellees may contend that the finding that the published rates were "non-mandatory" represents a determination by the court that the members of the Washington Board were under no obligation to adhere to the rates it adopted. Such an interpretation of the finding would be entirely inconsistent with the grounds which the court relied upon in its opinion. If the court had concluded that the parties did not intend that the Washington Board members conform to the schedule of commission charges which the Board adopted, then it would have found that there had been no agreement, combination or conspiracy as to the rates to be charged. That would have been the end of the case, and the court would not have had to go further. The sole question which the court considered, whether an agreement fixing rates to be charged for personal services is illegal *per se*, need not have been reached.

In addition, if the "non-mandatory" finding is interpreted as a finding that there was no obligation to adhere to the adopted rates, it is contrary to the undisputed evidence. The Executive Secretary of the Washington Board, in response to inquiries from members as to whether they could cut rates without violating their agreement with the Board, repeatedly replied that it was "unethical and improper" to cut these rates (R. 129). The Secretary was unable to recall a single instance in which the Board had advised

a member that its rules permitted sales at less than the standard rates (R. 129).

One of the objects of the Board as expressed in its Constitution and By-Laws (Gov. Ex. 3, R. 462) is to "assure to the public the services of responsible and trustworthy agents and brokers, acting on *definite and uniform standards of contracts and charges* * * *." [Emphasis supplied.] "Uniform standards" of charges could hardly be achieved if Board members are under no obligation to adhere to the rates adopted and published by the Board.

There is not the faintest suggestion in the various schedules of commissions that the rates are merely advisory. The schedule of commissions was "made part of the ethics" of the Washington Board (R. 24) because, as its counsel made clear in his opening statement (R. 24), "theretofore the business of selling and exchanging and leasing and managing real estate was a matter of every real estate agent charging about what he could get."

Finally, appellees themselves in their writings prior to this action repeatedly referred to their activities as "rate-fixing."[14] In the minutes of

[14] Indeed in the ninth defense in the answer of the Washington Board in the instant case (R. 391), the Board tacitly concedes that its members have combined to make an "offer" to the public "to perform professional services at the standard rates specified" and if the clients do not desire to pay the established rates they must look to brokers who are not members of the Board or the National Association.

the meeting of February 16, 1943 at which the rates were changed, the committee recommending the change referred to the fact that the Board "fixes the District of Columbia rate" (see *supra*, p. 9). And the Washington Board prepared for and issued to its members a standard form sales contract referring to the "rate of commission fixed by the Washington Real Estate Board" (see *supra*, note 3, p. 7).[15]

In any event, whether or not the members were under an obligation to adhere to the rates adopted and published by the Board is irrelevant. Proof of the price-fixing combination was complete when it was shown that the Washington Board adopted and published a schedule of commissions and that the members of the Board generally adhered to the rates so adopted. If the carefully worked out and generally observed schedule of commissions established by the Washington Board and its members does not reflect a combination to fix such commissions, then group action in establishing rates and general adherence

[15] In this connection the testimony of the Secretary of the Washington Board is significant. When asked why, if the rates were optional, the members did not ignore the rate zone boundaries existing prior to 1943, Mr. Rush stated (R. 129–130): "* * * because the public generally looked to the Real Estate Board for a standard rate of commission which would be fair and equitable and the Board * * * had built up a reputation for fair dealing, *fair compensation*, *fair rates*, *uniform rates* * * *". [Emphasis supplied.]

to the rates so established may be immunized by a mental reservation that the rates are not binding. If the type of collaboration on rates here involved is held not to constitute rate fixing, the door is open wide to effective evasion of the anti-trust laws.

B. THE NATIONAL ASSOCIATION AND NELSON HAVE AIDED AND ENCOURAGED THE WASHINGTON BOARD TO FIX COMMISSION RATES

There can be no doubt, as the trial court suggested, that "whatever the Washington Board did, the National encouraged the Washington Board or incited the Washington Board to do" (*supra*, note 11, p. 22). In fact, the National Association does more than encourage and incite rate fixing, since it makes adherence to its code of ethics a condition of membership, and that code provides that the "schedules of fees" established by the various real estate boards * * * should be observed by every Realtor" (*supra*, p. 14). Not only are local boards subject to expulsion for neglect or refusal to maintain and enforce the Code of Ethics, but each member board is explicitly required to adopt the code as "a part of its rules and regulations for violation of which disciplinary action may be taken" (*supra*, pp. 14–15).

This explicit language of the National Association's by-laws may not be assumed to be mere window dressing, in the absence of any proof to

that effect. No such proof was adduced.[16] The evidence at most indicates that local boards have not been subjected to disciplinary action by the National Association (R. 225). But the availability of sanctions for breach of an agreement in restraint of trade is not requisite to the existence of such an agreement, and certainly actual employment of sanctions which are available is not requisite (*supra*, p. 32). That some members of the Washington Board may have had mental reservations regarding their pledges to the National Association (e. g., R. 264, 292), is likewise immaterial. The members of the Washington Board have substantially adhered to the rates which it fixed.[17]

The character of the evidence here is strikingly similar to that in *Associated Press* v. *United States*, 326 U. S. 1. There, the district court had granted the Government's motion for summary judgment and based its decision almost entirely on the provisions in the By-Laws of the Associated Press. This Court stated (326 U. S. at pp. 8, 12):

[16] Appellee Nelson testified that the National Association's Code of Ethics was merely an "ideal" set forth for the members (R. 224), but admitted that the National Association has the power to expel a member for breach of the Code. (R. 225.)

[17] Indeed, appellee Nelson testified (R. 225) that no violation of the code by the members of the Washington Board had been brought to his attention.

> To put the issue into proper focus, it becomes necessary at this juncture to examine the By-Laws.
>
> All members must consent to be bound by them. They impose upon members certain duties and restrictions in the conduct of their separate businesses. For a violation of the By-Laws severe disciplinary action may be taken by the Association.
>
> * * * * *
>
> * * * the court below found, and we think correctly, that the By-Laws on their face, and without regard to their past effect, constitute restraints of trade. Combinations are no less unlawful because they have not as yet resulted in restraint. An agreement or combination to follow a course of conduct which will necessarily restrain or monopolize a part of trade or commerce may violate the Sherman Act, whether it be "wholly nascent or abortive on the one hand, or successful on the other." [Citing cases.]

The Code of Ethics of the National Association, together with (a) the agreement of the Washington Board to maintain and enforce it, and (b) the separate agreements of the respective members of the Washington Board to observe it, constitute a series of agreements to destroy rate competition among members of the Washington Board by preventing them from charging whatever rates they desire. The fact that the National Association did not itself determine the rates to be charged by members of the Wash-

ington Board does not relieve it from participation in a price-fixing scheme. As this Court said in *United States* v. *Masonite Corp.*, 316 U. S. 265, 276:

> The fixing of prices by one member of a group, pursuant to express delegation, acquiescence, or understanding, is just as illegal as the fixing of prices by direct, joint action.

Nor would it be significant if the Washington Board had never consulted with the National Association in determining the rates to be charged by their members in the District of Columbia. A combination which delegates to one of its members the power to fix a price that all members agree to observe is just as illegal as a combination that contemplates that all members will participate directly in the selection of particular prices. *United States* v. *Line Material Co.*, 333 U. S. 287; *United States* v. *Masonite Corp., supra.*

We submit that the Government is entitled to judgment against the National Association on the basis of its by-laws and code of ethics alone. If further evidence be needed, it is to be found in the activities of the National Association in preparing and distributing its "Guide on Rates, Rules and Customs". We have detailed that evidence in the Statement, *supra*, pp. 15–22, and it will merely be briefly summarized here. It shows that the National Association maintained a committee which studied brokerage commission rates in the

United States and offered to the local boards the results of its studies in the form of suggested rates to be charged for the sale, exchange, lease and management of real property. Appellee Nelson has stated that the purpose of this activity was to develop "something in the way of a national schedule" (R. 584) and in 1942 reported that many Boards were studying their schedules "with a view towards changing them to conform as nearly as possible with the suggested National Guide" (Gov. Ex. 43, R. 616).

Despite the testimony of the Executive Secretary of the Washington Board that "I doubt" if the Guide was "even considered" by the Washington Board (R. 126), the documentary evidence previously set out (*supra*, pp. 20–21) conclusively shows that the Washington Board has closely followed the recommendations of the "Guide".[18] Thus, for example, the language of several additions to the schedule of commissions adopted by the Board in 1944 follows virtually word for word the language suggested in the "Guide". The substantial identity of such technical language cannot be explained as coincidental.

In sum, the National Association and appellee Nelson are shown by this record to have encour-

[18] Plainly this documentary evidence would be entitled to greater weight than the oral testimony of an officer of a defendant (*United States* v. *United States Gypsum Company*, 333 U. S. 364, 395–396) even if the oral testimony were more positive.

aged the rate-setting activities of the Washington Board (1) by requiring the members of the National Association in the District of Columbia as a condition of membership to agree that the rates established by the Washington Board should be observed, and (2) by giving detailed assistance to the Washington Board in formulating the rates which it prescribes. If, as we contend, the Washington Board and its members have violated the Sherman Act, it is manifest that the National Association and appellee Nelson have been leading participants in that violation. It seems clear that the trial judge's finding that neither the National Association nor appellee Nelson "conspired with the Washington Real Estate Board, to fix and prescribe the rates of commission to be charged by members of the latter, nor to raise rates of commission in the District of Columbia" (Fng. 20, R. 434) can only be explained as a corollary of his conclusion that the Washington Board's activities are legal. The trial judge's colloquy with counsel (*supra*, p. 22) clearly so indicated. And his failure to discuss in his opinion, or to make findings as to any of the probative facts with respect to the National Association's activities, although requested by the Government so to do (R. 352–353, 430–432), reinforces this inference. If, however, the finding imports a determination that the National Association has not been a party to the rate-setting combination, it is evident that the finding flies in

the face of overwhelming and indisputable evidence.

II

THE COMBINATION FIXING REAL ESTATE BROKERAGE COMMISSION RATES IN THE DISTRICT OF COLUMBIA CONSTITUTES *per se* A VIOLATION OF SECTION 3 OF THE SHERMAN ACT

The court below recognized the established principle that price fixing in the case of commodities constitutes an unreasonable restraint of trade *per se* (R. 439), but it held that principle to be inapplicable to rate fixing in the case of the services rendered by real estate brokers. The court also concluded that "For men to combine to regulate the compensation to be charged by them for their own services is entirely legal" (Concl. 2, R. 435). This conclusion might import a holding that the Washington Board is entitled to exemption from the antitrust laws as a labor union, or, on the other hand, the court may have held that fixing brokerage fees is not unreasonable *per se*.[19] In any event, whether

[19] The court likened a real estate board to a labor union (Op. R. 439) despite the fact that real estate brokers are frequently not only employers (R. 250–251, 263, 273, 296, 297), but corporations, and that the court found such to be the case with some members of the Washington Board (Fng. 3, R. 433). But the sentence in the opinion which appears to constitute the only *holding* reads as follows (R. 440):

"The Court is of the opinion that for persons engaged in a particular occupation to fix or prescribe a standard charge for their services does not alone and of itself create an unrea-

the court based its ultimate decision on the view that combinations in respect of personal services are not within the reach of the Sherman Act, or the more restricted view that combinations to fix the rates charged for such services may be shown to create an unreasonable restraint but are not illegal *per se*, we think its decision was demonstrably erroneous.

A. THE PER SE RULE APPLIED TO PRICE-FIXING HAS EQUAL APPLICATION TO RATE-FIXING BY REAL ESTATE BROKERS

This Court has consistently held that both Sections 1 and 3 of the Sherman Act prohibit unreasonable restraints upon trade and commerce in services as well as goods. *United States* v. *Trans-Missouri Freight Association;* 166 U. S. 290, and *United States* v. *Joint Traffic Association,* 171 U. S. 505 (transportation services); *Atlantic Cleaners & Dyers, Inc.* v. *United States,* 286 U. S. 427 (cleaning, dyeing and renovating wearing apparel); *Associated Press* v. *United States,* 326 U. S. 1 (news services); *American Medical Association* v. *United States,* 317 U. S. 519 (medical and hospital services); *United States* v. *Para-*

sonable restraint of trade in violation of the Sherman Act."

And the statement immediately following makes it even clearer that the court had no thought of declaring appellees' activities exempt from the Act (R. 440):

"* * * A different problem might be presented if the rates fixed were shown to be unreasonable or oppressive in themselves or if it appeared that they resulted in a substantial diminution of competition or otherwise created an unreasonable restraint of trade or commerce."

mount Pictures, Inc., 334 U. S. 131 (distribution and exhibition of motion pictures). See *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 493, 495, 498.[20]

The *Atlantic Cleaners & Dyers* case, *supra*, is apposite here. The defendants in that case were engaged in the business of performing cleaning, dyeing and renovating services in the District of Columbia. They defended the action on the ground that "they were engaged solely in the performance of labor and rendering service" (286 U. S. at 431) and so were not engaged in trade or

[20] The lower federal courts have held that the Sherman Act applies to restraints upon the practice of medicine by individual physicians (*United States* v. *American Medical Association*, 110 F. 2d 703, 710 (C. A. D. C.), certiorari denied, 310 U. S. 644); theatrical entertainment (*Ring* v. *Spina*, 148 F. 2d 647 (C. A. 2)); the exhibition of professional baseball games and the transmission of broadcasts and telecasts thereof (*Gardella* v. *Chandler*, 172 F. 2d 402 (C. A. 2)); and performance of musical compositions (*Alden-Rochelle, Inc.* v. *American Society of Composers, Authors and Publishers*, 80 F. Supp. 888 (S. D. N. Y.)).

There are also numerous state court decisions holding that agreements fixing prices for services violate state antitrust laws or common law rules. *More* v. *Bennett*, 140 Ill. 69, 29 N. E. 888 (legal stenographers); *Graf* v. *Master Horse-Shoers' Protective Assn.*, 1 Ohio N. P. (N. S.) 423 (blacksmiths); *Bailey* v. *Association of Master Plumbers*, 103 Tenn. 99, 52 S. W. 853 (plumbers); *Gatzow* v. *Buening*, 106 Wisc. 1, 81 N. W. 1003 (liverymen); *Employing Printers Club* v. *Dr. Blosser Co.*, 122 Ga. 509, 50 S. E. 353 (printers); *State* v. *Wilson*, 73 Kans. 343, 84 Pac. 737 (livestock dealers' commissions). *Contra: State* v. *Duluth Board of Trade*, 107 Minn. 506, 121 N. W. 395 (grain dealers' commissions); but see *Campbell* v. *Motion Picture Machine Operators' Union*, 151 Minn. 220, 186 N. W. 781 (exhibition of motion pictures).

commerce. In rejecting that defense, this Court expressly adopted the broad interpretation of the word "trade" found in the following language of Mr. Justice Story on circuit in *The Schooner Nymph*, 18 Fed. Cas. 506, 507 (D. Me.) (286 U. S. at 436–437):

> The argument for the claimant insists, that "trade" is here used in its most restrictive sense, and as equivalent to traffic in goods, or buying and selling in commerce or exchange. But I am clearly of opinion, that such is not the true sense of the word, as used in the 32d section. In the first place, the word "trade" is often, and indeed generally, used in a broader sense, as equivalent to occupation, employment, or business, whether manual or mercantile. Wherever any occupation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts or in the learned professions, it is constantly called a *trade*. Thus, we constantly speak of the art, mystery, or trade of a housewright, a shipwright, a tailor, a blacksmith, and a shoemaker, though some of these may be, and sometimes are, carried on without buying or selling goods.

Price-fixing agreements among those engaged either in selling commodities or in providing services have consistently been held to create unreasonable restraints of trade *per se*. *Trans-Missouri Freight Association* and *Joint Traffic*

Association cases, *supra*; *United States* v. *Trenton Potteries*, 273 U. S. 392; *Atlantic Cleaners & Dyers* case, *supra*; *United States* v. *Socony-Vacuum Oil Company*, 310 U. S. 150; *United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533, 535–436; *United States* v. *Line Material Co.*, 333 U. S. 287; *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 143; *United States* v. *Maryland & Virginia Milk Producers Association, Inc.*, C. A. D. C., decided June 17, 1949 (C. C. H. Tr. Reg. Rep. 48–51, par. 62,452) certiorari denied, 338 U. S. 831; *Ring* v. *Spina*, 148 F. 2d 647, 650–651 (C. A. 2).

Hopkins v. *United States*, 171 U. S. 578, and *Anderson* v. *United States*, 171 U. S. 604, upon which appellees may rely, create no exception to the *per se* rule. The holding in the *Hopkins* case was that livestock commission merchants were not engaged in interstate commerce.[21] The *Anderson* case held that a rule of a livestock exchange requiring members not to recognize any trader not a member of the exchange did not effect an unreasonable restraint of trade and was therefore not outlawed by Section 1 of the Sherman Act. Neither case establishes the proposition that

[21] That holding is clearly inapplicable to this case which involves only trade or commerce in the District of Columbia. Moreover, as this Court has noted, the case was in effect overruled by *Stafford* v. *Wallace*, 258 U. S. 495. See *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 230, note 9; *Wickard* v. *Filburn*, 317 U. S. 111, 121–122, note 20.

the *per se* rule is inapplicable to combinations involving services, and the cases cited above clearly demonstrate that no such implied limitation is to be found in the Act.

The court below apparently regarded the distinction between what it termed "personal services" and other types of services as crucial, and declined to apply the *per se* rule to the former. Even if it be assumed, *arguendo,* that the distinction has validity, it is difficult to see its application here. Some of the members of the Washington Board may be individuals working alone, and, if so, the services rendered by them are "personal" in the sense that the members themselves perform them. But other members of the Washington Board, as the court found, are incorporated (Fng. 3, R. 433) or employ salesmen. (Statement, *supra,* p. 6.) To call the services rendered by them "personal" is to make any and all kinds of services personal.

Even if it were applicable to this case, the distinction drawn by the district court between "personal" and other services finds no support in the cases arising under the Sherman Act. Certainly this Court has made no such distinction. In the *Atlantic Cleaners & Dyers* case, *supra,* the record reveals that this Court had before it the appeal of (a) four corporations engaged in the business of cleaning clothes and four of their officers, and (b) two individuals who were in the cleaning business as a partnership (O. T. 1931, No. 667,

record pp. 2, 25). There was no allegation in the complaint that the particular prices agreed upon were unreasonable, but merely an agreement to raise the current prices, to adhere thereafter to certain agreed minimum and uniform prices and to allocate customers. The conduct charged was held to violate Section 3 of the Sherman Act.

In *Ring* v. *Spina,* supra, the question was raised as to the legality under Section 1 of the Sherman Act of the contracts of the Dramatists' Guild of the Authors' League of America, an association of playwrights. The evidence showed that a producer of plays was compelled to sign the Guild's "Minimum Basic Agreement" before any Guild member-author was permitted to license others to use his plays. That Agreement fixed the minimum prices for plays to be paid by the producer. Plaintiff alleged that he was forced to sign the Agreement and sought a temporary injunction prohibiting defendants from enforcing it. The decision of the district court denying the temporary injunction was reversed.[22]

The Court of Appeals for the Second Circuit noted that the purpose of the Minimum Basic Agreement was, in the words of the Guild's president, " 'to produce a fair return for the labor of its members who write plays for a living' " (148 F. 2d at 651). While recognizing that the Agreement fixed the

[22] After a trial on remand, a permanent injunction was granted by Judge Rifkind. *Ring* v. *Spina,* 84 F. Supp. 403 (S. D. N. Y.).

compensation to be charged by playwrights for their own services, the court relied on the *Trenton Potteries* and *Socony-Vacuum Oil* cases in holding that a "'price-fixing combination' is 'illegal per se'" (p. 650) and "is not saved by the high purpose for which it is conceived" (p. 651).[23]

Whatever the precise nature of the distinction between personal services envisioned by the court below, we submit that the underlying reasons for the consistent application by this Court of the *per se* rule to price fixing apply with equal force to the real estate brokerage business. The primary reason underlying the rule was first clearly stated by this Court in the *Trenton Potteries* case, *supra*, where this Court said (273 U. S. at 397–8):

> The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of

[23] Cf. *United States* v. *Sugar Institute*, 15 F. Supp. 817 (S. D. N. Y.), modified on other grounds and affirmed, 297 U. S. 553. One of the several questions involved in that case was the legality of an agreement fixing sugar brokers' commissions. Judge Mack said (at p. 903):

"* * * the commission is an important element in the cost of sugar. The evidence indicated that there was active competition for brokerage service prior to Institute action regulating brokers' commissions. Fairness in the commission rate does not validate an agreement, otherwise illegal. Trenton Potteries Co. Case, supra; * * *."

> the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions.[24]

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[24] Compare the following language from the Court's opinion in the *Trans-Missouri Freight Association* case, *supra*, 166 U. S. at 331-2:.

"What is a proper standard by which to judge the fact of reasonable rates? Must the rate be so high as to enable the return for the whole business done to amount to a sum sufficient to afford the shareholder a fair and reasonable profit upon his investment? If so, what is a fair and reasonable profit? That depends sometimes upon the risk incurred, and the rate itself differs in different localities: which is the one to which reference is to be made as the standard? Or is the reasonableness of the profit to be limited to a fair return upon the capital that would have been sufficient to build and equip the road, if honestly expended? Or is still another standard to be created, and the reasonableness of the charges tried by the cost of the carriage of the article and a reasonable profit allowed on that? And in such case would contribution to a sinking fund to make repairs upon the roadbed and renewal of cars, etc., be assumed as a proper item? Or is the reasonableness of the charge to be tested by reference to the charges for the transportation of the same kind of property made by other roads similarly situated? If the latter, a combination among such roads as to rates would, of course, furnish no means of answering the question."

The court below apparently believed that the defendants would have violated Section 3 of the Sherman Act if they had been shown to have fixed rates that were "unreasonable or oppressive in themselves" (Op. R. 440; Concl. 1, R. 435). If legality thus depended upon whether the rates fixed were unreasonable or oppressive, the courts would be required to determine in each case what constitutes reasonable commission rates. For if, as to agreements fixing either prices for goods or rates for so-called personal services, the courts must draw the line between agreements fixing unreasonable or oppressive prices or rates, which are outlawed, and agreements fixing reasonable prices or rates, which are permissible, the courts will thereby be indirectly vested with rate-making powers and duties. But this Court has consistently rejected a construction of the Sherman Act which would impose such a burden on the Government and the courts.

In rejecting the application of the *per se* rule, the court below suggested that the decision might have gone the other way if it had appeared that the rates fixed resulted in "a substantial diminution of competition or otherwise created an unreasonable restraint of trade" (Op. R. 440). But the court's own findings demonstrate that the Washington Board members do a substantial portion of the real estate brokerage business in the District of Columbia (Fng. 2, R. 433) and that they generally adhere to the prescribed

rates (Fngs. 11, 12, R. 434). Since price competition is obviously thereby substantially diminished, it can only be inferred that the court below regarded price competition as relatively unimportant. That view is directly contrary to the oft repeated view of this Court, recently reiterated in *United States* v. *Line Material Co.*, 333 U. S. 287, 309, that "there can be no clearer evidence of restraint of trade" than control of prices. Indeed, the present record is a reflection of the truism that the almost inevitable consequence of price-fixing by those who furnish goods or services is increase in prices.[25]

The answer of the Washington Board contended that the public interest was served by having the members of the Washington Board jointly offer their services at a fixed, uniform rate of commission (R. 389, 390, 392). And the court below also suggested that rate-fixing in the real estate brokerage business "has generally been considered as being in the public interest" (Op. R. 440).[26] While not spelled out, it was implied that

[25] See Gov. Exs. 20 (R. 552–554), 43 (R. 616) and 48 (R. 617–618); Fng. 10, R. 433–434.

[26] The court apparently thought that the long continuation of rate-fixing by real estate brokers gave that practice a certain sanctity. But compare *United States* v. *Associated Press*, 52 F. Supp. 362, 364 (S. D. N. Y.) affirmed, 326 U. S. 1, where some of the unlawful by-laws had been in effect for over 40 years and were not shown to have been concealed from the public; and the long-standing rate-fixing practices of private combinations in the insurance industry declared unlawful in the *South-Eastern Underwriters* case, *supra*.

the public interest in preventing extortionate charges is greater than the loss of the benefits of rate competition. The district court indicated in its opinion and findings that elimination of "overcharges" was one of the advantages deriving from the Washington Board's operations.[27] It should be noted, however, that appellees offered no proof, aside from their own unsupported assertions, that the present rates themselves are not "overcharges."[28]

Those policy considerations that argue for uniformity and standardization of real estate brokers' commissions apply with equal force to fire insurance premiums and insurance agents' commissions. Yet this Court applied the *per se* rule to a combination fixing rates for these premiums and commissions in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U. S. 533, 535–536.

[27] (R. 438, Fng. 14, R. 434). Conceding, *arguendo*, that the activities of the Board tend to eliminate variations in rates, we suggest that this conclusion is hardly consistent with any contention that the Washington Board did not agree upon rates (see *supra*, Point I). The Government felt compelled to assign this finding (14) as error, because there was no evidence in the record to support the statement that there was "chaos and confusion" in the District of Columbia before the Washington Board attempted to fix rates (see note 6, *supra*, p. 10).

[28] The Court of Appeals for the District of Columbia has labeled the commission rate fixed by the Board for obtaining a lease as "unconscionable" on its face. *Hecht Co.* v. *Whiteford*, 137 F. 2d 929, 931 (C. A. D. C.), certiorari denied, 320 U. S. 795.

And the Court's condemnation of any judicial sanction of price-fixing on asserted public policy grounds was made unmistakably clear in *United States* v. *Socony-Vacuum Oil Co., supra.* The Court said (310 U. S. at pp. 221–2):

> Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies. It has no more allowed genuine or fancied competitive abuses as a legal justification for such schemes than it has the good intentions of the members of the combination. If such a shift is to be made, it must be done by the Congress * * * the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike.

If any doubts remained, they would be put at rest by the language of the Court in *United States* v. *Line Material Co.*, 333 U. S. 287, 309–310:

> Despite possible advantages to a stable economy from efficient cartels with firm or fixed prices for products, it is crystal clear from the legislative history and accepted judicial interpretations of the Sherman Act that competition on prices is the rule of congressional purpose and that, where exceptions are made, Congress should make them.

If price competition is to be the rule unless Congress creates an exception, price competition should be the rule in the real estate brokerage business in the District of Columbia. There are no peculiarities of the real estate business of which we are aware that should cause this Court to adopt a different rule regarding real estate brokerage rate-fixing than was adopted by this Court for premiums for fire insurance and agents' commissions, prices for cleaning and dyeing clothes or by the Court of Appeals for charges for licensing production of plays.

The legislative scheme for the regulation of real estate brokers in the District of Columbia contains no authorization of rate-fixing—public or private. On August 25, 1937, Congress enacted a law (50 Stat. 787) "To define, regulate, and license real-estate brokers, business chance brokers, and real-estate salesmen; to create a Real Estate Commission in the District of Columbia; to protect the public against fraud in real-estate transactions; and for other purposes."[29] The Act empowers the Commission to license only those who are "trustworthy and competent" (Sec. 4, 50 Stat. 789). The Act did not authorize the Commission to regulate rates of commission for brokers. Section 16 (50 Stat. 797) provides in part:

> This Act shall not be construed to release any person, partnership, association, or corporation from civil liability or criminal

[29] This law was amended in 1939 in respects not here pertinent. 53 Stat. 1352.

> prosecution under the laws applying to the District of Columbia.

In the light of this expression of Congressional intent, we submit that this Court may assume that Congress did not conceive it to be in the public interest to delegate the power to the courts, to the Real Estate Commission or to the appellees to fix rates—reasonable or otherwise—for real estate brokers' services in the District of Columbia.

B. THE RATE-FIXING ACTIVITIES OF REAL ESTATE BROKERS ARE NOT EXEMPTED FROM THE SHERMAN ACT BY SECTION 6 OF THE CLAYTON ACT

Finally, the court below likened the Washington Board "to a labor union of real estate brokers" (R. 439), and implied that it is exempted from the prohibitions of the Sherman Act by what the court termed "the pertinent public policy in respect to personal services" (R. 439) to be found in Section 6 of the Clayton Act (38 Stat. 730, 731; 15 U. S. C. 17).[30] That Section provides as follows:

> SEC. 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid

[30] As pointed out previously, *supra*, pp. 43–44, we think it probable that the court did not actually hold that such an exemption applies.

> or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Section 6 relates exclusively to "labor, agricultural, or horticultural organizations" and their members. The Washington Board is not such an organization. Members of the Washington Board are employers rather than employees. They occupy offices (Gov. Ex. 20, R. 553) and commonly employ varying numbers of salesmen (R. 250–251, 263, 273, 280). Their brokerage services involve no employer-employee relationship, but are rendered pursuant to a series of independent contracts, each with a separate customer (see Gov. Ex. 26, R. 575). It is settled by the decisions of this Court that activities of this character lie wholly outside the scope of Section 6 of the Clayton Act, as well as outside of Section 20 of the Clayton Act and the related provisions of the Norris-LaGuardia Act (47 Stat. 70, 73, 29 U. S. C. 101, 113).[31]

In *Columbia River Packers Association, Inc.* v. *Hinton,* 315 U. S. 143, the Packers Association had sued for an injunction to restrain numerous fishermen and their union from engaging in cer-

[31] These sections implement Section 6 by restricting the power of federal courts to issue injunctions in cases involving or growing out of labor disputes.

tain activities alleged to constitute an attempt to monopolize the fishing industry in the Northwest in violation of the Sherman Act. Defendants contended that the Norris-LaGuardia Act removed jurisdiction from the federal courts to issue an injunction in the case. This Court noted that the fishermen owned boats and carried on their business as "independent entrepreneurs", held that the Clayton and Norris-LaGuardia Acts do not "include controversies upon which the employer-employee relationship has no bearing", and distinguished its decisions in *New Negro Alliance* v. *Grocery Co.*, 303 U. S. 552, and *Milk Wagon Drivers' Union* v. *Lake Valley Co.*, 311 U. S. 91, by observing that there the "employer-employee relationship was the matrix of the controversy" (p. 147).

In the *American Medical Association* case, 317 U. S. 519, the District Medical Society contended that a dispute between it and Group Health involved terms and conditions of employment of the doctors hired by Group Health, and on that ground claimed immunity under Section 20 of the Clayton Act as expanded by Section 13 of the Norris-LaGuardia Act. This Court held that the District Medical Society was not "an association of employes in any proper sense of the term" but was "an association of individual practitioners each exercising his calling as an independent unit" and therefore not covered by the Clayton and

Norris-LaGuardia Acts (p. 536). See also *American Medical Association* v. *United States*, 130 F. 2d 233, 243 (C. A. D. C.), affirmed, 317 U. S. 519.

In *United States* v. *Women's Sportswear Manufacturers Association*, 336 U. S. 460, 463–464, decided at the last term, the defendants claimed immunity under the Clayton Act from charges that they were combining to restrain trade in violation of the Sherman Act by compelling their customers to agree not to permit non-members of the defendant Association to stitch garments. This Court found that the stitching contractors were entrepreneurs, not employees, and stated:

> The stitching contractor, although he furnishes chiefly labor, also utilizes the labor through machines and has his rentals, capital costs, overhead and profits. He is an entrepreneur, not a laborer.[32]

In *Ring* v. *Spina*, 148 F. 2d 647 (C. A. 2), the Dramatists' Guild contended that it was a labor organization and that its members were laborers within the meaning of Section 6 of the Clayton Act. The court stated (148 F. 2d at 652):

> Here not only are the disputing parties not in an employer-employee relationship, but, unlike the Allen Bradley case, the controversy cannot concern itself with conditions of employment, since none of the parties affected are in any true sense employees.

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[32] Compare Gov. Exs. 20 (R. 553) and 48 (R. 618) where appellees refer to real estate brokers' "costs of doing business."

> An author writing a book or play is usually not then even in any contractual relation with his producer. If and when he does contract, he does not continue in the producer's service to any appreciable or continuous extent thereafter. Normally the author appears more nearly like the fishermen entrepreneurs of the Hinton case or the doctors in the American Medical Association case than workmen banded together in a union. The minimum price and royalties provided by the Basic Agreement, unlike minimum wages in a collective bargaining agreement, are not remuneration for continued services, but are the terms at which a finished product or certain rights therein may be sold. And no wages or working conditions of any group of employees are directly dependent on these terms. We think the exception therefore inapplicable.

Assuming, as the court below believed, that there is no distinction under the Clayton Act between salaries and commissions and that the word "labor", as used in the Act, comprises intellectual as well as manual labor (Op. R. 439), this obviously does not make all commissions the product of labor. The district court apparently considered the fact that both laborers and real estate brokers perform "personal services" to be the crucial common denominator. But this Court in the cases cited and the court of appeals in *Ring* v. *Spina* has found the crucial distinction to lie

neither in the method of payments nor in the character of the work but rather in whether the "labor" is that of an employee or that of an entrepreneur who assumes the risk of the business. Tested by such standards the members of the Washington Board are clearly shown to be independent businessmen, not employees of a labor organization. They seek profits, not wages.

III

THE JUDGMENT OF ACQUITTAL IN THE CRIMINAL ACTION AGAINST THE WASHINGTON BOARD AND NATIONAL ASSOCIATION IS NOT RES JUDICATA AS TO THIS ACTION

In the court below the defense of res judicata was asserted and overruled,[33] and it is again urged here in support of the decision below. The defense was based upon a judgment of acquittal in a criminal action against the Washington Board and National Association involving the same facts involved in the present action (Fng. 22, R. 435). We think that ruling correctly applied long-established principles to the facts of the present case.

It has uniformly been held that a verdict of acquittal in a criminal action is not a bar to a subsequent civil action involving the same defendants and the same facts (*Stone* v. *United States*, 167

[33] (Concl. 4, R. 436.) The district court had previously made the same ruling in denying a motion for summary judgment, and the court of appeals had dismissed an appeal for want of jurisdiction (Statement, *supra*, pp. 4–5).

U. S. 178; *Murphy* v. *United States*, 272 U. S. 630; *Helvering* v. *Mitchell*, 303 U. S. 391), except where the civil action is essentially punitive (*Coffey* v. *United States*, 116 U. S. 436). Perhaps the principal reason for this rule, and certainly a sufficient one to justify it, is the greater burden of proof resting upon the Government in a criminal case than in a civil case (see *Stone* v. *United States, supra*, at p. 188).

In *Helvering* v. *Mitchell, supra*, Mitchell had been tried and acquitted of a criminal charge of willful attempt to evade payment of his income tax. In a subsequent civil suit by the Commissioner of Internal Revenue to collect taxes owed and a 50 percent penalty for fraudulent evasion, Mitchell asserted that the acquittal in the criminal case was a bar to the collection of the penalty. In rejecting this defense the Court relied primarily upon the differences in burden of proof and stated (303 U. S. at 397–8):

> The difference in degree of the burden of proof in criminal and civil cases precludes application of the doctrine of *res judicata*. The acquittal was "merely * * * an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused." *Lewis* v. *Frick*, 233 U. S. 291, 302. It did not determine that Mitchell had not wilfully attempted to evade the tax. That acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its

> nature, arising out of the same facts on which the criminal proceeding was based has long been settled. *Stone* v. *United States*, 167 U. S. 178, 188; *Murphy* v. *United States*, 272 U. S. 630, 631, 632. Compare *Chantangco* v. *Abaroa*, 218 U. S. 476, 481, 482.

The Court also recognized important procedural differences between civil and criminal actions which may frequently cause a different result on the same underlying facts. The Court stated (303 U. S. at 402):

> Civil procedure is incompatible with the accepted rules and constitutional guaranties governing the trial of criminal prosecutions, and where civil procedure is prescribed for the enforcement of remedial sanctions, those rules and guaranties do not apply. Thus the determination of the facts upon which liability is based may be by an administrative agency instead of a jury, or if the prescribed proceeding is in the form of a civil suit, a verdict may be directed against the defendant; there is no burden upon the Government to prove its case beyond a reasonable doubt, and it may appeal from an adverse decision; furthermore, the defendant has no constitutional right to be confronted with the witnesses against him, or to refuse to testify; and finally, in the civil enforcement of a reme-

dial sanction there can be no double jeopardy.[34]

It must also be noted that tools of discovery available in civil actions are lacking in criminal actions. In this category are interrogatories (F. R. C. P., Rule 33); requests to admit (Rule 36) and depositions (Rules 30, 31). Similarly, the Government may call hostile witnesses in civil proceedings and examine them as if on cross examination (Rule 43b). This privilege does not, of course, obtain in criminal actions.

Finally, the distinction as to right of appeal which was noted in the *Mitchell* case is of practical importance. Any errors in the course of a criminal trial culminating in an acquittal are beyond correction. It would be a perversion of the principles of res judicata to say in such circumstances that the Government has had its day in court and that the acquittal has settled the points of law and fact involved for all purposes. See *United States* v. *Wallace & Tiernan Co.*, 336 U. S. 793, 800–803; *cf. Johnson Co.* v. *Wharton*, 152 U. S. 252.

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[34] Civil antitrust actions are plainly remedial in nature and so far as our research reveals, there has never been a successful attempt to assert a verdict of acquittal in a criminal antitrust action as res judicata in a subsequent civil antitrust suit. *Cf. United States* v. *Warner Bros. Pictures, Inc.*, 13 F. Supp. 614 (E. D. Mo.), affirmed *per curiam*, 298 U. S. 643; *United States* v. *U. S. Gypsum Co.*, 51 F. Supp. 613 (D. D. C.).

It is settled law that the civil and criminal remedies under the Sherman Act are independent and that the Government may seek either without resorting to the other first. *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, 52. If the contention were to prevail that an acquittal in a criminal case may be res judicata in a civil case, this privilege would, as a practical matter, be destroyed. In order to have the full benefit of the procedural flexibility and right of appeal accorded in a civil suit, the United States would be compelled in each case to bring its civil suit first. There is no statutory or policy justification for such a requirement.

The present case falls squarely within the rules above reviewed. A comparison of the procedure followed in the two actions here—criminal and civil—serves as a graphic illustration of the differences commented upon in the Court's opinion in *Helvering* v. *Mitchell, supra.* In the criminal case a number of exhibits offered by the Government were excluded; and the judgment of acquittal permitted no appeal.[35] In the instant action the greater latitude in admitting evidence in civil cases resulted in the admission of 16 of the exhibits excluded in the criminal case (R. 335–336).

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[35] See 18 U. S. C. 3731. Cf. *United States* v. *Waters*, 175 F. 2d 340 (C. A. D. C.).

In the criminal case the judgment of acquittal represents only the conclusion of the trial court that upon the evidence presented a reasonable mind could not infer guilt beyond a reasonable doubt. See *Curley* v. *United States*, 160 F. 2d 229, 232–233 (C. A. D. C.), certiorari denied, 331 U. S. 837. The judgment of acquittal is essentially similar to a verdict of acquittal by a jury, namely, that the Government's case had not been proven beyond a reasonable doubt. The fact that the judge, rather than the jury, made such a determination is immaterial here. The crucial circumstance is that the standard of proof necessary in the criminal case (guilt beyond a reasonable doubt), whether applied by judge or jury, is fundamentally different from the applicable standard of proof in a civil proceeding (preponderance of evidence).

In the court below appellees unsuccessfully attempted to distinguish the judgment of acquittal in the criminal case from the ordinary acquittal which would not be res judicata. The attempted distinction was based on the peculiar form of their motion for judgment of acquittal at the close of the Government's case in the trial of the criminal action. The motion was made pursuant to Rule 29 of the Federal Rules of Criminal Procedure as follows (R. 326–327):

> The National Association of Real Estate Boards moves for a judgment of acquittal

on the ground that no substantial evidence has been adduced against the said defendant upon which a reasonable mind could infer guilt beyond a reasonable doubt.

The National Association of Real Estate Boards makes the same Motion on the ground there has been no showing of any violation of the Sherman Act. In this aspect the motion is in the nature of a demurrer to the evidence.[36]

Appellees have contended that the effect of the granting of the above motion was to determine that the indictment did not state an offense under the Sherman Act. But their motion did not seek such a ruling. Had appellees wished to challenge the indictment, the method of doing so was a motion under Rule 12 to dismiss the indictment. It seems clear that appellees elected to make their motion under Rule 29 so that the resulting order would be a factual determination of the sufficiency of the Government's evidence which would not be appealable. Having succeeded in securing such a factual determination, appellees understandably would like to convert it into a determination of law that the facts stated in the indictment did not amount to an offense under the Act. To do this it would be necessary, however, to show (1) that a motion for a judg-

[36] Appellee Washington Board adopted the motion of the National Association (R. 305).

ment of acquittal under Rule 29 does, in law, raise the issues properly raised by a motion to dismiss the indictment—that is, the sufficiency of the indictment to charge a violation of law, assuming the truth of all facts charged therein; and (2) that the criminal trial judge did treat as true all the facts stated in the indictment.

The only issue that was open for decision by the criminal trial judge was the sufficiency of the evidence to prove the facts charged. So much of Rule 29 as is pertinent follows;

> (a) * * * The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed *if the evidence is insufficient to sustain a conviction of such offense or offenses.* [Emphasis supplied.]

For res judicata purposes, "the significance of what a court says it decides is controlled by the issues that were open for decision," *Angel* v. *Bullington*, 330 U. S. 183, 187.[37]

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[37] In the court below appellees argued that their motion for a judgment of acquittal was in the nature of a demurrer to the evidence at common law, and then argued that such a demurrer assumes as true the facts alleged in the indictment. Cf. *United States* v. *U. S. Gypsum Co.*, 51 F. Supp. 613, 615–639 (concurring opinion by Judge Stephens). Although we think it clear that Rule 29 does not authorize such a procedure, appellees' position would not be advanced if the Rule in terms permitted a demurrer to the evidence. The purpose of the common law demurrer to the evidence was to test the legal

Quite apart from the fact that Rule 29 does not authorize a challenge to the *indictment* but only to the *evidence* offered, it is clear that the criminal trial judge had no thought that he was passing upon the sufficiency of the indictment. At no time while the case was before the court in the criminal trial did the appellees take the position that they were seeking a ruling on the facts as *charged* rather than the facts shown by the Government's evidence. Never did they advise the court that they would later claim that it had been asked to rule on the indictment. And even a casual comparison of the indictment with the criminal trial judge's opinion shows conclusively that he did not consider as true all the facts charged in the indictment. In the opinion of the court in the criminal trial is found this paragraph (R. 307):

> *The facts of the matter are* that the defendants, who are real estate men, have

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sufficiency of the evidence adduced to prove the facts alleged in civil actions; its purpose was not to determine the sufficiency as a matter of law of the facts set forth in the complaint. This Court, in *Galloway* v. *United States*, 319 U. S. 372, 400, described a demurrer to the evidence as a procedure under which "the defendant at the end of the trial admitted all facts *shown* by the plaintiff as well as all inferences which might be drawn from the facts, and asked for a ruling of the Court on the 'law of the case'" [Emphasis supplied]. And see *Slocum* v. *New York Life Insurance Company*, 228 U. S. 364, 389, 400; Freeman, *Judgments* (5th ed. 1925) sec. 742; McBaine, *Trial Practice: Directed Verdicts: Federal Rule*, 31 Calif. L. R. 454; cf. *Tatcher* v. *United States*, 107 F. 2d 316 (C. A. 3).

> entered into voluntary associations for the purpose of bettering the conduct of their business, and after entering such associations *they still continue their individual businesses in full competition with each other,* * * * [Emphasis supplied.]

Again, it is stated (R. 308–309):

> * * * *where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct or restrain commerce,* but that it was entered into with the object of properly and fairly regulating the transactions of the business in which the parties to the agreement were engaged, such agreements will be upheld, in my view, as not within the statute; * * * [Emphasis supplied.]
>
> * * * * *
>
> *It is common knowledge, that competition between real estate brokers is in fact strong,* and success in getting the business depends not upon offering to transact for less than the uniform rate but upon the skill and facilities possessed for obtaining the highest price for the property from the purchasers. [Emphasis supplied.]

It is noteworthy that in each of these statements the court refers to facts. These facts were most earnestly disputed in the criminal case. Paragraph 26 of the indictment (R. 319) charged:

> The aforesaid combination and conspiracy * * * have had, *as intended by the defendants,* the following effects: *

(a) Competition between members of the the defendants in determining fees * * * has been eliminated.

* * * * * *

(c) The activities and business policies of real estate brokers * * * have been actively and effectively restricted and dominated. [Emphasis supplied.]

These quotations show that: (1) the criminal trial judge did weigh the evidence, and (2) he did not assume the truth of all the facts charged in arriving at his judgment of acquittal. He did not, directly or indirectly, rule on the sufficiency of the indictment. The word "indictment" was not even mentioned in the opinion save in the opening sentence describing the case before the court as brought "in the form of an indictment" (R. 306).

In light of the foregoing, it is evident that the judgment of acquittal in the criminal case represents only the decision of the court that the Government had not proved the criminal offense charged. And it is settled by *Helvering* v. *Mitchell, supra,* and the other cases cited (*supra* pp. 62–63) that such a decision is not res judicata in a subsequent civil action.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment should be reversed with directions that relief be granted the United States as prayed in the complaint.

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